88-1915

No.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

THE ONEIDA INDIAN NATION OF NEW YORK,

Petitioner,

v.

STATE OF NEW YORK, *et al.*,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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QUESTIONS PRESENTED

I. Whether the national government lost its sovereign power over the extinguishment of Indian title under the Articles of Confederation?

II. Whether the Treaty of Fort Stanwix reserved to the national government the right to extinguish the Indian title of the Oneida?

THE PARTIES

Petitioner Oneida Indian Nation of New York is a plaintiff below, and an Indian tribe recognized by the United States with its tribal lands in the State of New York. Other plaintiffs below are the Oneida Indian Nation of Wisconsin, the Oneida of the Thames Band, and seventy-six individual members of the Oneida Indian Nation of New York, all of whom are petitioners in this Court in No. 88-1758. Additional plaintiffs below are the Houdenosaunee, or Six Nations Confederacy, and five of its six constituent Iroquois tribes, the Mohawk, Oneida, Onondaga, Seneca and Tuscarora nations.

Respondents are the members of a proposed class of defendants in petitioner's action below, which consists of The State of New York and its Governor, thirteen New York counties, and various landowners, including six executive departments of the State of New York and their Commissioners, eight divisions and offices of the State of New York and their Directors, two corporations of the State of New York and their officers, the New York State Thruway Authority and its board members, two New York port authorities and their board members, the State University of New York and its Commissioner, and the Power Authority for the State of New York and its trustees.

Respondents in the actions filed by the Oneida Indian Nation of Wisconsin and the Oneida of the Thames Band below are the representatives of a certified class of defendants below. That defendant class consists of the State of New York and its Governor, twelve New York counties, and various landowners, including six executive departments of the State of New York and their Commissioners, eight divisions and offices of the State of New York, two corporations of the State of New York, the New York State Thruway Authority, two port

authorities of the State of New York, the Power Authority for the State of New York, the State University of New York, and all persons who assert an interest in lands claimed by petitioners, except those persons who occupy the subject lands as their principal places of residence to the extent of but not exceeding two acres of the subject lands surrounding their residences. The district court below certified the defendant class and designated as class representatives the respondents State of New York, Twelve New York Counties, Valentine Ryan, the St. Regis Paper Company and the Georgia Pacific Corporation. Respondent New York State Electric and Gas Corporation appeared as an individual defendant below.

TABLE OF CONTENTS

	Page
Table of Authorities	vi
Opinions Below	1
Jurisdiction of the Court	1
Constitutional Provisions, Treaties, and Statutes Principally Involved	2
Statement of the Case	2
A. Summary of Facts	2
B. Proceedings Below	4
Reasons for Granting the Writ	6
I. By Misinterpreting the Articles of Confederation, the Court of Appeals Has Upset the Balance of Power Between the National and State Governments on an Important Issue of Indian Law	7
A. The Court of Appeals Erred in Holding That the Right of Extinguishment Ceased to Be a Sovereign Power of the National Government for Nine Years	8
B. The Court of Appeals Misconstrued Article IX, Clause 4 of the Articles of Confederation	12
II. In Holding that the Treaty of Fort Stanwix Did Not Reserve to the National Government the Right to Extinguish the Indian Title of the Oneida, the Court of Appeals Misconstrued Both the Nature of Congress' Power to Make Peace with the Indians and the Language of the Treaty	14

Page

A. Under Article IX, Clause 1 of the Articles of Confederation, and Under Its Inherent Powers of External Sovereignty, Congress Had the Authority to Enter into a Treaty of Peace with the Indian Nations which Reserved to the National Government the Right of Extinguishment 14

1. *Article IX, Clause 1* 14

2. *External Sovereignty* 15

B. Pursuant to its Power to Establish and Maintain Peace, Congress Entered into the Treaty of Fort Stanwix with the Oneida Indian Nation and Reserved to Itself the Right of Extinguishment ... 18

Conclusion 24

TABLE OF AUTHORITIES

Cases:	Page
Choate v. Trapp, 224 U.S. 665 (1912)	19
Choctaw Nation v. Oklahoma, 397 U.S. 620 (1970)	19
County of Oneida v. Oneida Indian Nation, 470 U.S. 226 (1985) ("*Oneida II*")	1, 8, 11, 19
The New York Indians (Fellows v. Denniston), 72 U.S. (5 Wall.) 761 (1867)	13
Johnson v. M'Intosh, 21 U.S. (8 Wheat.) 543 (1823)	8
Jones v. Meehan, 175 U.S. 1 (1899)	19
McClanahan v. State Tax Comm'n, 411 U.S. 164 (1973)	19
Menominee Tribe v. United States, 391 U.S. 404 (1968)	19
Navajo Tribe of Indians v. United States, 624 F.2d 981 (Ct. Cl. 1980)	22
Oneida Indian Nation v. County of Oneida, 414 U.S. 661 (1974) ("*Oneida I*")	1, 11, 13
Oneida Indian Nation v. New York, 691 F.2d 1070 (2d Cir. 1982)	3, 19
Seminole Nation v. United States, 316 U.S. 286 (1942)	22
United States v. Creek Nation, 295 U.S. 103 (1935)	22
United States v. Curtiss-Wright Export Corp., 299 U.S. 304 (1936)	16, 17, 18
United States v. Minnesota, 270 U.S. 181 (1926)	23
United States v. Oneida Nation, 576 F.2d 870 (Ct. Cl. 1978)	22
United States v. Winans, 198 U.S. 371 (1905)	19, 20
Washington v. Washington State Commercial Passenger Fishing Vessel Ass'n, 443 U.S. 658 (1979)	19
Winters v. United States, 207 U.S. 564 (1908)	19, 20
Worcester v. Georgia, 31 U.S. (6 Pet.) 515 (1832)	8, 9, 10, 16, 20
Constitution, Treaties, Statutes:	
Articles of Confederation, Art. VI, cl. 5	15
Articles of Confederation, Art. IX, cl. 1	2, 6, 12, 14, 15, 18
Articles of Confederation, Art. IX, cl. 4	2, 6, 12, 13, 17

	Page
Treaty with the Cherokees, 7 Stat. 18 (1785)	11
Treaty with the Chickasaws, 7 Stat. 24 (1786)	11
Treaty with the Choctaws, 7 Stat. 21 (1786)	11
Treaty with the Delawares, 7 Stat. 13 (1778)	10
Treaty with the Six Nations, 7 Stat. 15 (1784) ("Treaty of Fort Stanwix")	*passim*
Regal Proclamation of Oct. 7, 1763, *Annual Register* 208	2, 3, 9, 20
Proclamation of Sept. 22, 1783, 25 *Journals of Continental Congress* 602 (1783)	2, 3, 5, 6
25 U.S.C. § 177 (1982) (Nonintercourse Act)	11, 20
Other Authorities:	
Resolution of July 12, 1775, 2 *Journals of Continental Congress* 175 (1775)	10
Resolution of Oct. 15, 1783, 25 *Journals of Continental Congress* 684 (1783)	22
1 *American State Papers: Indian Affairs* 142 (W. Lowrie & M. Clarke eds. 1832)	20
Minutes of the Proceedings at Fort Stanwix, *Indian Treaties 1778 to 1795* at 14 (Historical Society of Pennsylvania, Wayne MSS.)	21
Letter, Indian Commissioners to the President of Congress, Oct. 5, 1784, *Papers of the Continental Congress* 133 (Nat'l Archives Microfilm Pub., No. M-247, Roll 69)	21

Petitioner Oneida Indian Nation of New York respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit, entered on October 31, 1988.[1]

OPINIONS BELOW

The opinion of the Court of Appeals for the Second Circuit herein is reported at 860 F.2d 1145 (2d Cir. 1988), *aff'g* 649 F. Supp. 420 (N.D.N.Y. 1986). The opinion of the Court of Appeals is reprinted in the Appendix at pages 1a-4a; the opinion of the District Court is reprinted at pages 42a-86a. Prior reported opinions in this case are at 85 F.R.D. 701 (on class certification); 520 F. Supp. 1278, *aff'd in part and rev'd in part*, 691 F.2d 1070 (on the first dismissal of the claims); 102 F.R.D. 445, *rev'd*, 732 F.2d 261 (on intervention of other Indian parties); 757 F.2d 19 (on disqualification of counsel); and 771 F.2d 51 (on motion to recall mandate).[2]

JURISDICTION OF THE COURT

The judgment of the Court of Appeals for the Second Circuit was entered on October 31, 1988, and a timely Petition for Rehearing and Rehearing En Banc was denied on December 29, 1988 (App. at 87a-88a). The Oneida parties filed timely applications for an extension of time to file their petitions for certiorari, and by orders dated March 23, March 27 and March 29, 1989, Justice Marshall granted extensions up to and including April 28, 1989. The Oneida Indian Nation of New York filed a timely application for a further extension of time, and by order dated May 1, 1989, Justice Marshall extended the

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[1]Presently pending before this Court is a petition for writ of certiorari (No. 88-1758) seeking review of the same judgment, which was filed by the Oneida Indian Nation of Wisconsin, the Oneida of the Thames Band, and certain individual members of the Oneida Indian Nation of New York.

[2]The lands at issue in this action are different from those that were the subject of the actions heard by this Court in *Oneida Indian Nation v. County of Oneida*, 414 U.S. 661 (1974) ("*Oneida I*"), and *County of Oneida v. Oneida Indian Nation*, 470 U.S. 226 (1985) ("*Oneida II*").

time of the Oneida Indian Nation of New York to file a petition up to and including May 28, 1989. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS, TREATIES AND STATUTES PRINCIPALLY INVOLVED

1. Articles of Confederation, Art. IX, cl. 1.
2. Articles of Confederation, Art. IX, cl. 4.
3. Treaty with the Six Nations, Oct. 22, 1784 ("Treaty of Fort Stanwix"), 7 Stat. 15, Art. II.
4. Proclamation of Sept. 22, 1783, 25 *Journals of Continental Congress* 602.

Because of their length, the constitutional provisions, treaties and statutes are set forth in the Appendix.

STATEMENT OF THE CASE

A. Summary of Facts

From time immemorial until the time of the acts complained of in this action, the Oneida Indian Nation, one of six nations referred to as the Iroquois, owned and occupied over 5 million acres of land in central New York State. During the colonial period, the British Crown preserved peace with the Oneida and other tribes by establishing boundaries between them and the American colonies and, through the order of 1761 and the Royal Proclamation of 1763 (App. at 101a), by requiring the consent of the Crown to extinguish tribal rights to land. Absent such consent from the sovereign, no colony had the right to purchase or otherwise acquire the aboriginal title to Indian land, notwithstanding the colonies' right of preemption—fee title—over that land.

Before and during the Revolution, the colonists shared Britain's perception that Indian affairs should be handled at the

national level. In 1775, the Continental Congress established three departments to manage Indian affairs. "Rather than create an entirely new policy, the Continental Congress continued the basic approach of the British Proclamation of 1763 . . . ." *Oneida Indian Nation v. New York*, 691 F.2d 1070, 1076 (2d Cir. 1982).

After the Revolution, the Confederal Congress continued the framework adopted by the British Crown and the Continental Congress. On September 22, 1783, Congress enacted a Proclamation affirming the policy of securing Indian land found in the Royal Proclamation of 1763. Congress' Proclamation (App. at 108a) declared that:

> "[T]he United States in Congress assembled . . . do hereby prohibit and forbid all persons from making settlements on lands inhabited or claimed by Indians, without the limits or jurisdiction of any particular State, and from purchasing or receiving any gift or cession of such lands or claims without the express authority and directions of the United States in Congress assembled."

Like the Royal Proclamation, the Proclamation of 1783 represented an effort to preserve peace with the Indian Nations. That purpose was expressly declared in the Proclamation (App. at 108a).

In October of 1784, the Treaty with the Six Nations ("Treaty of Fort Stanwix") was concluded between federal commissioners of the northern department and the Six Nations Iroquois Confederacy. Again, the Congressional purpose was to achieve and preserve peace with the Indian nations. Four of the six nations of the Iroquois Confederacy had fought with the British during the Revolution, while the other two—the Oneida and Tuscarora Nations—had fought with the colonies. The national government attached considerable importance to this treaty because it was afraid that the taking of Indian lands would produce another war, with its former allies as well as its former enemies. This fear was justified; the State of New York had earlier attempted to obtain land cessions from the Iroquois.

Article II of the Treaty of Fort Stanwix (App. at 89a) expressly provided:

> "The Oneida and Tuscarora nations shall be secured in the possession of the lands on which they are settled."

In 1785 and 1788, the State of New York, without the consent of Congress, concluded "treaties" with the Oneida that purported to extinguish Indian title to 5½ million acres of Oneida land. It is the legality of New York's action that is at issue here.

B. Proceedings Below

The proceedings below involve two separate lawsuits. The first, 78-CV-104, was filed in 1978 by petitioner, the Oneida Indian Nation of New York, and certain named individual members thereof. The second, 79-CV-798, was filed in 1979 by the Oneida Indian Nation of Wisconsin and the Oneida of the Thames Band. Although never formally consolidated, the two complaints have been handled together throughout the course of the litigation. The jurisdiction of the District Court was properly invoked pursuant to 28 U.S.C. §§ 1331 and 1362 for both cases.

Both complaints assert that the "treaties" of 1785 and 1788 by which the State of New York purported, without the consent of Congress, to extinguish the Oneida's Indian title were void because they violated, *inter alia*, the Articles of Confederation and the 1784 Treaty of Fort Stanwix.

On September 10, 1981, the District Court dismissed both complaints under Fed. R. Civ. P. 12(b)(6) for failure to state a claim. The District Court determined that at the time of the challenged transactions, New York State held the authority unilaterally to extinguish Indian title and that the federal treaties and laws relied upon by the Oneida parties could not and did not limit that authority. 520 F. Supp. 1278, 1312-23 (N.D.N.Y. 1981). On appeal, the Second Circuit affirmed dismissal of claims asserting the existence of a constructive trust, a perpetual lease, and violations of the constitutional

prohibition against state treaties. However, the Second Circuit reversed and remanded for further proceedings on the issues of Congress' authority to enter into and the meaning of the Articles of Confederation, the Treaty of Fort Stanwix and the 1783 Proclamation. 691 F.2d at 1097. In particular, because of the complexity of the claims, the Second Circuit held, "[i]n sum we do not view the foregoing claims as lending themselves to summary disposition on a motion to dismiss. A more thorough analysis of all relevant evidence offered by the parties is required." *Id.* at 1095. None of the parties sought review of that decision by this Court.

On remand, the District Court held a two-week evidentiary hearing for the limited purpose of aiding that court in interpreting the relevant treaties and laws for the motions to dismiss. Eleven witnesses, qualified as experts on Indian/white relations or federal/state authority at the time, testified; these experts also submitted reports with supporting contemporaneous evidence. During the course of this hearing conflicting testimony was given on virtually every issue. On November 1, 1986, the District Court again dismissed the complaints pursuant to Fed. R. Civ. P. 12(b)(6) for failure to state a claim, adhering to its earlier interpretation of the relevant federal laws and treaties (App. at 86a).

The Oneida parties again appealed to the Second Circuit. On October 31, 1988, the Court of Appeals affirmed the Rule 12(b)(6) dismissal of the Oneida claims. In doing so, the Second Circuit—like the District Court—resolved numerous contested factual issues against the Oneida parties, notwithstanding the procedural posture of the case.[3]

The Second Circuit held that under the Articles of Confederation, Congress' power to enter into peace treaties with

[3]Petitioners in No. 88-1758 have raised as a separate Question Presented whether the procedures used by the District Court and the Court of Appeals contravene the Federal Rules of Civil Procedure. Petitioner here expressly reserves that issue for briefing on the merits as fairly comprehended in the Questions Presented herein, in addition to the matters discussed in Reasons for Granting the Writ.

Indian tribes came not from Article IX, clause 1 (powers of war and peace), but from Article IX, clause 4 (Indian affairs) (App. at 14a). The Court of Appeals concluded that during the 1780's the states had a right to extinguish Indian title to land within their borders without the consent of Congress, and that Article IX, clause 4 of the Articles of Confederation preserved that right for the states, in sharp contrast to well-recognized federal law under the Constitution (App. at 25a).

The Second Circuit recognized that, under the doctrine of external sovereignty, states' rights to extinguish Indian title could not interfere with Congress' determinations on war and peace. The Second Circuit, however, did not rule on whether, pursuant to its external sovereignty powers, Congress could and did regulate land transactions with the Oneida. Instead, the Court of Appeals concluded that the issue was whether the two specific land transactions made by New York in fact posed a threat to the peace, and deemed this issue nonjusticiable (App. at 27a-31a).

Notwithstanding the settled rule requiring a broad construction of treaties in favor of the Indians, the Court of Appeals read the 1784 Treaty of Fort Stanwix and the accompanying course of conduct narrowly, to give the Indians no federal protection against state land acquisitions (App. at 31a-39a). The Second Circuit also held that Congress' Proclamation of 1783 did not apply to New York's land transactions with the Oneida Indian Nation (App. at 39a-41a). The Oneida parties filed a timely Petition for Rehearing and Rehearing En Banc, which was denied by the Court of Appeals on December 29, 1988 (App. at 87a-88a).

REASONS FOR GRANTING THE WRIT

As the Second Circuit recognized, this case is "unusual because it requires a federal court, perhaps for the first time, to determine whether actions of a state violated the Articles of Confederation." (App. at 2a.) But this case is more than just "unusual". It is also important, presenting substantial questions

concerning federal-state relations, the exclusive power of the national government to treat with Indian tribes, the fiduciary duty owed to Indians by the United States, and the meaning and construction of Indian treaties. Review by this Court is accordingly called for, particularly since the court below decided these important and substantial questions in a manner inconsistent with long-settled doctrines laid down by this Court.

The opinion below sets a dangerous precedent. The Second Circuit has turned around the distribution of power between the national and state governments concerning the right to extinguish Indian title for a period of time in which massive Indian land transactions occurred. The Second Circuit has curtailed the national government's power to deal with issues relating to maintenance of the peace under the external sovereignty doctrine established by this Court. And the Second Circuit has undermined the canons of Indian treaty construction created by this Court. These errors in the Court of Appeals' analysis have ramifications beyond the context of this dispute and need to be corrected.

I. By Misinterpreting the Articles of Confederation, the Court of Appeals Has Upset the Balance of Power Between the National and State Governments on an Important Issue of Indian Law.

The Court of Appeals ruled that under the Articles of Confederation, from 1781 to 1789, the general right to extinguish Indian title was dispersed among the various states, rather than being held by the national government. The effect of that ruling is to turn Indian treaty law on its head for that nine-year period by shifting the right of extinguishment away from the national sovereign, in sharp contrast to the situation both before and after that time. That change in the balance of power between the national and state governments has serious ramifications for the validity of all Indian land transactions and Indian treaties during an important period in this nation's history.

A. The Court of Appeals Erred in Holding That the Right of Extinguishment Ceased to Be a Sovereign Power of the National Government for Nine Years.

The Oneida's right to the land at issue derives from the doctrine of discovery. This doctrine evolved during the European age of exploration and colonization and has been recognized by this Court. *See County of Oneida v. Oneida Indian Nation* ("*Oneida II*"), 470 U.S. 226, 234 (1985). Under this doctrine, discovery of an area of land by a European sovereign automatically vested fee title to that land in the discovering sovereign. *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 543-44 (1832); *see also Johnson v. M'Intosh*, 21 U.S. (8 Wheat.) 543, 586 (1823). In practical effect, this gave the discovering sovereign a right of preemption against later discovery by other sovereigns. However, Indians occupying those lands were recognized to have a right of occupancy and use, which is referred to as "Indian title". *See Worcester*, 31 U.S. (6 Pet.) at 543-46. In order to obtain full title to discovered land that was occupied by Indians, one would have to obtain both the Indian title possessed by the Indians, and the fee title possessed by the sovereign. However, no one could purchase Indian title without the consent of the discovering sovereign. *Oneida II*, 470 U.S. at 234. This is called the right of extinguishment—the power to extinguish Indian title.

The dispute in this case is not over the right of preemption or fee title. Petitioner concedes that at the time of the state "treaties" complained of, the right of preemption had devolved to the State of New York. Rather, this case turns on whether New York was required to—but admittedly did not—obtain consent of the national government before it could extinguish the Oneida's Indian title.

A review of British, and subsequently American, Indian policy reveals that the national sovereign consistently regulated the extinguishment of Indian title for the purpose of preserving peace with the Indian tribes. That power was exercised by conditioning the validity of any acquisition of Indian title by the

colonies, and later the states, on the consent of the national government.

Like other European sovereigns, Great Britain adhered to the doctrine of discovery. Through various colonial charters, Britain conveyed its fee title interest (and consequent right of preemption) to its colonies. The Crown did not, however, surrender its power to control the colonies' acquisition of Indian title—its right of extinguishment. Before the American Revolution, the Crown exercised that sovereign power over the extinguishment of Indian title in order to secure and preserve the peace with the Indians. On November 23, 1761, the Crown issued an order to the governors of the British colonies forbidding the issuance of grants to any Indian lands without prior approval by the British Board of Trade. Later, through the Proclamation of October 7, 1763, the Crown forbade white settlement west of the crest of the Appalachian Mountains and, to the east, reaffirmed the requirement of Crown approval prior to the acquisition of Indian lands (App. at 104a-106a). Thus, before Independence, the several colonies and private individuals could not acquire Indian title without the Crown's consent.

During the Revolution, the colonies were united in war against Britain and its Indian allies. Although not perfectly organized and without a governing document, the colonies' situation required that they deal with independent sovereigns—such as the Indian nations—with a single voice. As this Court stated in *Worcester:*

> "The necessities of our situation produced a general conviction, that those measures which concerned all must be transacted by a body in which the representatives of all were assembled, and which could command the confidence of all; congress, therefore, was considered as invested with all the powers of war and peace . . . . *From the same necessity, and on the same principles, congress assumed the management of Indian affairs; first, in the name of these united colonies; and afterwards, in the name of the United States.* Early attempts were made at negotiation, and to regulate trade with them . . . . The

> confederation found congress in the exercise of the same powers of peace and war, in our relations with Indian nations, as with those of Europe." 31 U.S. (6 Pet.) at 558 (emphasis added).[4]

By virtue of this necessary and exclusive power, when open hostilities with Great Britain started in 1775, the Continental Congress appointed its own commissioners "to treat with the Indians . . . in order to preserve peace and friendship with the [said] Indians, and to prevent their taking any part in the present commotions." Resolution of July 12, 1775, 2 *Journals of Continental Congress* ("*JCC*") 175 (1775). Thus, during the Revolution, the national government assumed the prior role of the British sovereign, negotiating a number of treaties with the various Indian tribes; not surprisingly, one provision of those treaties was the protection of Indian title to land. The first Indian treaty concluded by the Continental Congress, with the Delaware Nation in 1778, contained the following guarantee:

> "Whereas the enemies of the United States have endeavoured, by every artifice in their power, to possess the Indians in general with an opinion, that it is the design of the States aforesaid, to extirpate the Indians and take possession of their country: to obviate such false suggestion, the United States do engage to guarantee to the aforesaid nation of Delawares, and their heirs, all their teritoreal [sic] rights in the fullest and most ample manner, as it hath been bounded by former treaties . . . ." 7 Stat. 13, 14 (1778), Article VI.

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[4]Respondents will undoubtedly refer to the cross-examination testimony of one of the Oneida parties' experts, Dr. Horsman, at the evidentiary hearing in the District Court. In discussing the period of the Revolutionary War, between 1775 and 1781, Dr. Horsman testified that there was confusion caused by the absence of any written constitution, and that the right of preemption and the right of extinguishment "melded" because, in his view, there was no authority clearly superior to the states. However, as *Worcester v. Georgia* makes clear, notwithstanding the confusion in those times, there *was* a higher authority for the management of Indian affairs—the states collectively. To the extent that Dr. Horsman, based on his erroneous legal premise, concluded that the right of extinguishment must have devolved to the states individually, rather than collectively, he is in that respect in error.

After the Revolution, during the Articles of Confederation period, the United States Congress continued to make treaties to secure the lands of the Indian nations in order to preserve the peace. The efforts of Congressional commissioners culminated in a series of treaties with allies, neutrals and former enemies of the United States, including the 1784 Treaty of Fort Stanwix (App. at 89a-90a), which is at issue in the present case, as well as the Treaty with the Cherokees, 7 Stat. 18 (1785), the Treaty with the Choctaws, 7 Stat. 21 (1786), and the Treaty with the Chickasaws, 7 Stat. 24 (1786). Through these treaties, the Confederal government continued to exercise the power over extinguishment of Indian title that had previously rested with the Crown.

Exclusive national control over the extinguishment of Indian title is well settled under the Constitution. In its first session under the Constitution, in 1790, Congress recognized this exclusive national power in passing the Indian Nonintercourse Act. That law, which is still in force, provides that no land transaction with an Indian tribe shall be valid without federal consent. 25 U.S.C. § 177 (1982). This Court has held that control of Indian title is the exclusive province of the federal government under the Constitution and federal common law. *See Oneida II,* 470 U.S. at 240; *Oneida Indian Nation v. County of Oneida* ("*Oneida I*"), 414 U.S. 661, 667-74 (1974).

In short, although the sovereign's identity changed repeatedly during the last half of the eighteenth century—from the Crown, to the Continental Congress, to the Confederal Congress, and finally to the federal government created by the Constitution—the power to treat with the Indians was a power exercised by the national sovereign to preserve the peace, and the national sovereign continued to hold and exercise the power over extinguishment of Indian title.

The Court of Appeals decision below, if left standing, creates an anomalous nine-year gap under the Articles of Confederation. The effect of the Second Circuit's holding is that the national sovereign had the right to extinguish Indian

title before 1781, and after 1789, but the states held that right and therefore were able to abrogate national treaties with the Indians for the intervening period of less than a decade (*see* App. at 25a). Of course, the Articles of Confederation represented a different form of government than was adopted under the Constitution, with a different balance of powers between the nation and the states. However, the Articles of Confederation did not undermine the central government's powers concerning Indian affairs, including the right of extinguishment of Indian title.

B. The Court of Appeals Misconstrued Article IX, Clause 4 of the Articles of Confederation.

When the Articles of Confederation defined the body politic of the United States, they specifically committed core sovereign powers of the nation exclusively to Congress. Among Congress' "sole and exclusive" powers were the rights to declare war and to make peace, Art. IX, cl. 1, the authority to "enter[ ] into treaties and alliances", *id.*, and the power to "regulat[e] the trade and manag[e] all affairs with the Indians", Art. IX, cl. 4 (App. at 95a, 97a).

Congress' "sole and exclusive" power to regulate trade and manage affairs with the Indians under Article IX, clause 4, is limited by the "legislative right proviso": "provided that the legislative right of any State within its own limits be not infringed or violated."[5] The Court of Appeals construed that legislative right proviso as giving to each state the power to extinguish Indian title within its boundaries. That holding largely emasculates the national sovereign's "sole and exclusive" power over Indian affairs and ignores long-standing legal principles and the decisions of this Court.

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[5]There is a second qualifier in Article IX, clause 4: Congress' "sole and exclusive right and power" is over "all affairs with the Indians, not members of any of the States". As the District Court recognized, this clause reserved to the states authority over Indians who had left their lands and become assimilated into the society of one of the states (App. at 62a-64a; *cf.* App. at 20a). The Oneida had not become so assimilated, so that qualifier is not an issue in this petition.

As an initial matter, the principal form of Indian trade to be regulated at that time was land transactions. In view of this, it simply makes no sense to take the trading of large tracts of Indian lands out of Congress' jurisdiction through a construction of the vaguely worded legislative right proviso.

The legislative right proviso did not "reserve" to the states a right to extinguish Indian title, because they had not previously possessed the right of extinguishment. As discussed above, under the Crown and then under the Continental Congress, and subsequently under the Constitutional system, the power of extinguishment was the sole and exclusive prerogative of the national sovereign. Article IX, clause 4, with its broad general grant of national powers over Indian affairs, does not remove that power of extinguishment from the Confederal Congress through the vaguely worded legislative right proviso.

Properly construed, the legislative right proviso simply reserved to the states the right of preemption, the underlying fee title to the lands that is subject to the Indians' right of occupancy. This Court has already noted that "fee title to Indian lands in these [original thirteen] States, or the preemptive right to purchase from the Indians, was in the State." *Oneida I*, 414 U.S. at 670. The right of extinguishment, however, was not. Indeed, in ruling on the meaning of a land cession compact between New York and Massachusetts entered into in 1786—during the Articles of Confederation—this Court noted that "this provision had no relation to the Indian occupation, or Indian occupants, for the two States possessed no power to deal with Indian rights or title. They were dealing exclusively with the pre-emption right after the Indian title was extinguished . . . ." *The New York Indians (Fellows v. Denniston)*, 72 U.S. (5 Wall) 761, 769 (1867).

The legislative right proviso must be interpreted as preserving the political arrangements that already were in existence, and not as radically changing the distribution of power regarding the extinguishment of Indian title. To be consistent with the general language of Article IX, clause 4, the legislative right proviso should be construed to reserve to the several states

the preemptive right—fee title—to the lands, while retaining in the national government—as the law had been before 1781, and as it has been since 1789—control over the right of extinguishment of Indian title. The contrary construction below—permitting the State of New York to take Indian title from the Oneida without the consent of the national government—is wrong and should be corrected by this Court.

II. In Holding that the Treaty of Fort Stanwix Did Not Reserve to the National Government the Right to Extinguish the Indian Title of the Oneida, the Court of Appeals Misconstrued Both the Nature of Congress' Power to Make Peace with the Indians and the Language of the Treaty.

In addition to its misconstruction of the legislative right proviso as granting the general right of extinguishment to the states, the Second Circuit ruled that although it was "arguable" that Congress had the power to reserve the right of extinguishment to itself in specific instances where required to preserve peace with the Indians, Congress did not do so in the Treaty of Fort Stanwix (App. at 31a-32a). This ruling understates the power of the national government and undercuts established rules of Indian treaty construction.

A. Under Article IX, Clause 1 of the Articles of Confederation, and Under Its Inherent Powers of External Sovereignty, Congress Had the Authority to Enter into a Treaty of Peace with the Indian Nations which Reserved to the National Government the Right of Extinguishment.

1. *Article IX, Clause 1.* Apart from its general power over the right of extinguishment, as confirmed by Article IX, clause 4 of the Articles of Confederation, Congress also had the power under Article IX, clause 1 to regulate states' land transactions with the Indians where necessary to maintain peace. Article IX, clause 1, provides:

> "The United States in Congress assembled, shall have the sole and exclusive right and power of determining on peace and war, except in the cases mentioned in the sixth article . . . ."

The Second Circuit erroneously found that the federal power to make peace treaties with the Indians did not fall under Article IX, clause 1. Indeed, the Second Circuit went so far as to conclude that clause 1 "has no application to Indians" (App. at 14a). This is clearly wrong. As the District Court recognized, "the plain language of clause 1 indicates that congress had clause 1 authority over Indians" (App. at 67a). Clause 1 gave Congress exclusive power over war and peace; since war with the Indians was a recurring fact and an ever-present threat during those times, it is illogical to exclude Indian peace treaties from the broad scope of that clause. Moreover, the referenced exception—Article VI, clause 5—authorized a state to engage in war without the consent of the national government if warned of "a resolution being formed by some nation of Indians to invade such State" imminently. The need for an explicit exception for cases of Indian invasion, and the reference to that exception in Article IX, clause 1, confirms that war and peace with Indians was contemplated by that clause.

As discussed above, the colonies' and subsequently the states' efforts to acquire the Indian title to land were a major cause of hostilities with the various Indian tribes. Congress' broad power to preserve the peace under the Articles of Confederation necessarily subsumed within it the power to regulate those acquisitions, through treaties or otherwise, if in Congress' determination the peace was threatened. Indeed, reserving power over the right of extinguishment in the national sovereign had been an often used method of preserving the peace with the Indians before and during the Revolution. Clearly that method remained within Congress' power under Article IX, clause 1.

2. *External Sovereignty.* In addition to its power under Article IX, clause 1, Congress also had the inherent authority to enter into peace treaties regulating state land transactions with the Indians by virtue of its external sovereignty. The Second Circuit, by rejecting the external sovereignty argument, disregarded clear statements by this Court of the essential nature and scope of Congress' powers.

Certain "external" powers—including the power to conduct foreign relations, make treaties, and control matters of war and peace—are effectively exercised only by a single sovereign body, and therefore inhere in the national government, independent of any document or explicit grant, "as necessary concomitants of nationality". *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 318 (1936). This Court has recognized that such powers of external sovereignty passed directly from the British Crown to the states as a collective whole after the Revolution, and were never held by the individual states.

> "As a result of the separation from Great Britain by the colonies acting as a unit, the powers of external sovereignty passed from the Crown not to the colonies severally, but to the colonies in their collective and corporate capacity as the United States of America. Even before the Declaration, the colonies were a unit in foreign affairs, acting through a common agency—namely the Continental Congress, composed of delegates from the thirteen colonies. That agency exercised the powers of war and peace, raised an army, created a navy, and finally adopted the Declaration of Independence." *Id.* at 316.

Congress, pursuant to these inherent powers of external sovereignty, had the authority to enter into peace treaties with the Indian tribes. That power again necessarily included the authority to regulate by treaty state land transactions with Indian tribes if, in Congress' determination, such regulation was required to maintain the peace.

The Second Circuit expressed doubt whether the "international powers" discussed in *Curtiss-Wright* included authority over Indian relations (App. at 29a). This Court, however, has previously made clear that, during the Confederal period, treaties with the Indian nations were considered analogous to treaties with European nations. "The confederation found congress in the exercise of the same powers of peace and war, in our relations with Indian nations, as with those of Europe." *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 558 (1832). The

Indian nations were regarded as sovereign states, and therefore land transactions with the tribes were treated as international transactions, regardless of whether or not the land involved was within state boundaries.

The Court of Appeals then held that, even if "international power" does include dealings with Indians, it is "too extravagant an extension of the concept of external sovereignty to maintain that it includes authority over *all* purchases of Indian land" (App. at 29a; emphasis in original). That was not and is not petitioner's argument concerning external sovereignty. Certainly, as discussed above, petitioner contends that the national government—from the Crown, to the Continental Congress, to the Confederal Congress, to the Constitutional Congress—exercised the general and exclusive right to extinguish Indian title, based on the authorities and arguments outlined in Point I. Petitioner's alternative argument under the external sovereignty doctrine is more limited: that Congress' powers of external sovereignty gave it exclusive authority over matters of war and peace, and pursuant to that power, based on Congress' determination that the peace was threatened, Congress could control the right of extinguishment in particular instances. Congress made such a determination, and exercised that war and peace power over the right of extinguishment, when it entered into the Treaty of Fort Stanwix with the Oneida.

The Court of Appeals held that whatever powers of external sovereignty existed were nonetheless limited by Article IX, clause 4 of the Articles of Confederation, which the Second Circuit had concluded reserved to the states the right to extinguish Indian title to land within their borders (App. at 25a). Such an analysis conflicts with this Court's reasoning in *Curtiss-Wright,* where the Court rejected the argument that state legislative powers are limitations (in that case under the Constitution) on the national government's exercise of its external sovereign powers. As the Court explained, "since the states severally never possessed international powers, such powers could not have been carved from the mass of state

powers but obviously were transmitted to the United States from some other source." *Curtiss-Wright,* 299 U.S. at 316.

This Court's reasoning holds equally true under the Articles of Confederation. Since the states individually never held power over matters of war and peace, the Articles of Confederation could not limit Congress' external sovereign power in that area. The United States, in its dealings as a sovereign on a matter of such national concern as war and peace, cannot be hindered by states' assertions of their individual rights. The Second Circuit's interpretation of the relationship between the states and the federal government would deprive the United States of an essential component of its sovereignty.

Finally, the Second Circuit concluded that the question of whether the New York land acquisitions in 1785 and 1788 threatened the peace, and thus implicated the external sovereignty powers, is a nonjusticiable issue (App. at 29a-30a). But that is not the question at all. The real question is whether Congress in 1784, when it entered into the Treaty of Fort Stanwix, made the determination that it would retain control over the right to extinguish the Oneida Indian title in order to maintain the peace with the Oneida and the other members of the Iroquois Confederacy. That issue is plainly justiciable; we address it below.

B. Pursuant to Its Power to Establish and Maintain Peace, Congress Entered into the Treaty of Fort Stanwix with the Oneida Indian Nation and Reserved to Itself the Right of Extinguishment.

As discussed above, Congress had the authority under Article IX, clause 1 of the Articles of Confederation, and under its powers of external sovereignty, to enter into peace treaties with the Indian nations. It exercised that authority in the Treaty of Fort Stanwix, which was negotiated by Commissioners appointed by Congress for the purpose of concluding the war with the four hostile tribes of the six Iroquois nations, and to secure the territories of its military allies, the Oneida and the Tuscarora. The Treaty explicitly states that its purpose is to make peace, and the Second Circuit held that it was "beyond

dispute that the 1784 Treaty of Fort Stanwix with the Six Nations Iroquois Confederacy . . . was entered into by the federal government in the exercise of its peace-making powers". *Oneida Indian Nation v. New York,* 691 F.2d 1070, 1088 (2d Cir. 1982).

The operative language in the Treaty of Fort Stanwix for purposes of this action is contained in Article II, which provides in its entirety:

> "The Oneida and Tuscarora nations shall be secured in the possession of the lands on which they are settled." (App. at 89a.)

Petitioner contends that this Article prevented New York from extinguishing the Oneida's Indian title to their land without the national government's consent. The Court of Appeals, in finding that Article II of the Treaty did not contain such a proscription, ignored important doctrines of Indian treaty construction established by this Court.

When interpreting ancient treaties, this Court has been sensitive to the drafting techniques of the time. This Court has recognized that early Indian treaties often used general terms to incorporate a more specific understanding. *See Washington v. Washington State Commercial Passenger Fishing Vessel Ass'n,* 443 U.S. 658, 674-79 (1979); *McClanahan v. State Tax Comm'n,* 411 U.S. 164, 173-75 (1973); *Menominee Tribe v. United States,* 391 U.S. 404, 406 & n.1 (1968); *Winters v. United States,* 207 U.S. 564, 575-77 (1908); *United States v. Winans,* 198 U.S. 371, 381-82 (1905).

Moreover, this Court has long recognized the duty of the judiciary to follow special rules of construction when interpreting Indian treaties. *See, e.g., Oneida II,* 470 U.S. at 247; *Choctaw Nation v. Oklahoma,* 397 U.S. 620, 631 (1970); *Winans,* 198 U.S. at 380-81. This duty derives from the trust relationship between Indian tribes and the national government and from the recognition that the Indian tribes were generally in a postion of unequal bargaining power. *See, e.g., Choate v. Trapp,* 224 U.S. 665, 675 (1912); *Jones v. Meehan,* 175 U.S. 1,

10-11 (1899). These canons of contruction require, among other things, that Indian treaties be construed according to the *Indians'* understanding, *see, e.g., Worcester,* 31 U.S. (6 Pet.) at 552-53; *id.* at 581-83 (McLean, J., Concurring), 552-53, and that ambiguities be resolved in favor of the Indians, *e.g., Winters,* 207 U.S. at 576.

The phrase "secured in the lands on which they are settled" must refer to a form of protection greater than that which the Oneida already possessed as owners of Indian title. *See Winans,* 198 U.S. at 380 (treaty must be interpreted to grant greater rights than tribe would have had without treaty). As used in the Treaty of Fort Stanwix, "secured" refers to the specific and well-known method of securing Indian title used by the Crown, the Continental Congress and the Confederal Congress: conditioning the extinguishment of Indian title on the consent of the national sovereign.

As described above, this was the accepted method of that time by which a sovereign secured Indian title. It was the method through which the Crown secured Indian title in its general order of 1761 and its Proclamation of 1763. The Confederal Congress used this method in its Proclamation of 1783. And after the adoption of the Constitution, Congress enacted the Nonintercourse Act of 1790, again requiring the consent of the national sovereign to extinguish Indian title as the method to secure title to tribal lands. 25 U.S.C. § 177 (1982).[6]

The construction of "secured" as requiring the consent of the national sovereign before Oneida Indian title could be extinguished also embodies the Indians' understanding of the

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[6] In explaining the Nonintercourse Act of 1790 to the Seneca tribe of New York, President Washington said:

> "Here, then, is the security for the remainder of your lands. No State, nor person, can purchase your lands, unless at some public treaty, held under the authority of the United States. The General Government will never consent to your being defrauded, but it will protect you in all your just rights."

1 *American State Papers: Indian Affairs* 142 (W. Lowrie & M. Clarke eds. 1832).

Treaty of Fort Stanwix. On October 3, 1784, the federal commissioners opened the Fort Stanwix negotiations stating that, "without the authority of Congress no business can be valid that may be attempted by particular people or States". Minutes of the Proceedings at Fort Stanwix, *Indian Treaties 1778 to 1795* at 14 (1784) (Historical Society of Pennsylvania, Wayne MSS). Several days later, the commissioners warned the tribes not to "listen to any overtures made to you by any person or body of men or by any particular State not authorized by Congress". *Id.* at 18.[7]

On October 17, 1784, Aaron Hill, a Mohawk chief, stated his understanding as follows:

> "You directed us not to attend to what any particular State might say to us on public business, for that the Commissioners of Congress alone were adequate to that purpose.
>
> "We of the Six Nations are fully sensible of the truth of this and we think that no particular State can have a right to treat separately, but that it belongs only to the United States . . . ." *Id.* at 24.

The Second Circuit suggested that a restriction on the Oneida's ability to alienate their land by requiring consent of the national government would not have benefited the Tribe at that time (App. at 33a). However, the record below—to the limited extent such a record was allowed to be developed—indicates that the Oneida had no desire to sell their land at the time of the Treaty of Fort Stanwix. Rather, the Tribe

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[7] On October 5, 1784, the commissioners informed the President of the Congress that the governor of New York had been told "that if he had any business to transact with the Indians he might do it under the patronage of the U.S.". Because the governor attempted to treat separately with the Indians, the commissioners stated "we thought proper to inform the Indians in our conference, that a treaty with an individual State without the sanction of Congress could be of no validity". Letter, Indian Commissioners to the President of Congress, Oct. 5, 1784, *Papers of the Continental Congress* 133 (Nat'l Archives Microfilm Pub., No. M-247, Roll 69).

wanted the national government to protect the Oneida land from dissipation by coercion and fraud.[8]

This construction is also supported by the special relationship between the Oneida Indian Nation and the national government that was confirmed at Fort Stanwix. When Congress promises to protect Indians in a treaty, a fiduciary or guardian/ward relationship is created. *Seminole Nation v. United States*, 316 U.S. 286, 296-97 (1942); *United States v. Creek Nation*, 295 U.S. 103, 109-10 (1935); *Navajo Tribe of Indians v. United States*, 624 F.2d 981, 987 (Ct. Cl. 1980). The Treaty of Fort Stanwix is such a treaty. Indeed, one court has specifically held that Article II of the Treaty of Fort Stanwix created a fiduciary relationship between the federal government and the Oneida. *United States v. Oneida Nation*, 576 F.2d 870, 875-78 (Ct. Cl. 1978). That the national government assumed responsibility in Article II as guardian of the Oneida lands supports the construction of that Article as requiring national consent prior to extinguishment of Indian title.

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[8] As a result of the Oneida's alliance with the Americans during the Revolutionary War, the Oneida territory was rendered virtually uninhabitable, and most of the Oneidas were forced to move to the protection of the United States at Schenectady, where they remained until the end of hostilities (Campisi Tr. 1122-24). The Oneida lands were also threatened by encroaching settlers and attempts by New York to extinguish vast tracts (Campisi Statement 29-35). The Treaty of Fort Stanwix, by requiring federal consent before Oneida lands could be alienated, protected the Oneida from these threats to their land.

There is no evidence in the record that the Oneida were looking to sell off any land in 1784. But even if they were, the federal government had made it clear to the Oneida that it would allow them to sell their land should they "think it for their own advantage to dispose of the same". Resolution of Oct. 15, 1783, 25 *JCC* 684, 687 (1783). Such statements would have been unnecessary if Article II did not require national consent to extinguish Indian title. These statements from the negotiation history establish that the federal government would act as a fiduciary, not only protecting the Tribe from unwanted extinguishment, but allowing extinguishment when that was truly desired by the Tribe.

The Court of Appeals erroneously suggested that the established canons of Indian treaty construction should not apply. Specifically, the Second Circuit referred to *United States v. Minnesota,* 270 U.S. 181, 209 (1926), which held that a treaty should not be applied to divest a state of land it has acquired, unless the purpose to do so be clearly shown. But that case and its rule of construction concern a *retroactive* divestiture of state land by a subsequent treaty. *Id.* at 206-07. In contrast, the Treaty of Fort Stanwix, which forbade unilateral state extinguishment, was entered into *before* the state "treaties" complained of here. Thus, the canons of Indian treaty construction are fully applicable to Article II of the Treaty. The Second Circuit, however, while acknowledging those canons, simply ignored them.

CONCLUSION

For the reasons stated above, petitioner Oneida Indian Nation of New York requests this Court to issue a writ of certiorari to review the decision of the Court of Appeals for the Second Circuit.

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Respectfully submitted,

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